In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1343

STANLEY GLUCKSMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed without opinion.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1971 (Pet. 16). The petition for a writ of certiorari was filed on February 11, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the instructions to the jury suggested that the return of the indictment indicated petitioner's probable guilt.

420-393—71

2. Whether petitioner was prejudiced by a question regarding a previous bribery charge which was not answered and which the jury was immediately told to disregard.

3. Whether the evidence was sufficient.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of receipt of a $3,000 bribe while conducting a tax audit as an Internal Revenue agent, in violation of 18 U.S.C. 201(c) (Tr. 571).[1] Petitioner was given a suspended prison sentence and fined $1,500. The court of appeals affirmed without opinion (Pet. 16).

The evidence shows that Bernard Pincus, a certified public accountant, and his partner did accounting work for Bernard Kushner and the latter's five corporations, one of which was Stripes, Inc. (Tr. 3–4). In 1964, petitioner was conducting a field audit of the 1961 income tax returns of Kushner and Stripes (Tr. 4–5, 188). On May 20, Pincus met petitioner at Kushner's place of business, where petitioner started to examine the 1961 return of Stripes (Tr. 4–5, 187–189). He discovered certain tax deficiencies on that return (Tr. 65–68, 425, 473, 484) and corresponding deficiencies on Kushner's 1961 personal return (Tr. 70–71, 92). Petitioner then threatened to find similar deficiencies in the returns of other Kushner corporations and to

[1] "Tr." refers to the 575-page transcript of the trial testimony, a copy of which we are lodging with the Clerk of this Court.

attack their multi-corporate tax structure (with the result of increased tax liability) if he was not paid $3,000 (Tr. 9–12, 14, 16, 17–18, 27–28, 61, 75, 92–93, 135–136, 139–140, 182–184, 186). Pincus informed Kushner of the bribe demand. He then told petitioner to call in two weeks (Tr. 19, 190).

It was thereafter decided to pay the bribe in order to avoid additional taxes and tax problems for future years (Tr. 21, 106, 108, 159–160, 191, 202, 217, 237–238). On June 15, 1964, at an office in Kushner's place of business, Pincus handed petitioner an envelope containing $3,000 in one hundred dollar bills which Pincus had received from Kushner (Tr. 24–25, 192). Just before he turned over the money Pincus removed $500 from the envelope, which had originally contained $3,500 (Tr. 25, 196–197, 234). At trial, Pincus produced his pocket diary containing a notation referring to the bribe payment (Gov. Ex. 1; Tr. 35–36, 118–119, 125).

After payment of the bribe, petitioner made no further audit of any tax returns of the Kushner corporations (Tr. 26, 200). In July or August 1964, petitioner sent Kushner a statement of the closing of the audit of Stripes (Tr. 27, 200). Petitioner limited assessments for additional taxes on the Stripes return to $1,000 and on Kushner's personal return to $2,000 (Tr. 18, 27, 28, 136). There was testimony that he could properly have made additional assessments on the 1961 Stripes return which would have yielded additional taxes (Tr. 29–30, 32, 140, 144–145). Nor did petitioner question the multi-corporate tax structure of the Kushner corporations (Tr. 27).

Prosecution and defense witnesses testified that petitioner was required under Internal Revenue Regulations (Tr. 315–316) and good auditing practices to examine the subsequent years' returns for Stripes (1962 and 1963) and the returns of any related corporations in which Kushner had a controlling interest (Tr. 261, 315–318, 320, 342, 360–362, 381). The testimony was that, if petitioner had complied with the regulations, substantial taxes could have been found due on the 1962 and 1963 Stripes returns as well as on other related corporate returns (Tr. 264–265, 301–302, 306–307, 322–324, 328, 372). Petitioner admitted in his trial testimony that he knew of these requirements when he conducted the audit (Tr. 480, 485–486). Petitioner was also required under the regulations to explain his failure to audit the 1962 Stripes return (Tr. 320, 360–362, 381). He did so with the statement that the "subsequent year has been assigned to field audit," when in fact it had not (Tr. 303, 304, 319, 362–363, 390, 452, 455, 501–502, 504–505). Petitioner testified that he "covered" himself by putting this statement in his report so that he would not be questioned or criticized for not examining a subsequent year's return (Tr. 494–495).

Petitioner denied making a threat to Pincus that he might raise the multi-corporation issue (Tr. 475–476) and denied that he asked for or received any money or bribe of any kind (Tr. 476).

ARGUMENT

1. When properly read in their entirety (*e.g. Boyd* v. *United States,* 271 U.S. 104, 107), the jury instruc-

tions did not leave the impression that the return of the indictment suggested petitioner's probable guilt. The relevant instructions stated (Tr. 546–548):

> * * * I want to tell you an indictment has absolutely no probative value. That is to say it is not proof of the commission of an act. It is merely a charge. An indictment is obtained generally—almost invariably in what we lawyers call an ex parte proceeding. That is a proceeding in which one side is represented. The Defendant is not there, nor does he have an attorney there. The Grand Jury hears certain testimony by investigative agents of the Government and comes to the conclusion that a crime was probably committed and that it is probable that a crime was committed by the Defendant named in the indictment, but that is no proof whatsoever. When the Defendant came in and was arraigned—charged with the acts contained in the indictment, he or his attorney on his behalf pleaded not guilty and he did in effect say to the Government, "I did not do what you charge me to have done. It is up to you to prove it" and that is precisely what the Government's burden and obligation is, to prove these charges beyond a reasonable doubt as I shall ultimately describe or define that term.
>
> A defendant charged with a crime under our law, does not have to prove his innocence. The burden, as I said a moment ago, is on the Government to prove that he was guilty and that presumption of innocence remains with the Defendant and he enjoys the benefit thereof throughout the trial and until the moment—

> until the very moment when you return to this Court with your verdict.
>
> The Government is required to prove each and every essential element of the crime charged beyond a reasonable doubt, as I shall define that term to you. * * *

As the foregoing shows, the court merely elaborated on the function of the grand jury; at the same time it made abundantly clear that the indictment was no evidence of guilt. Cf. *United States* v. *Glaziou*, 402 F. 2d 8, 15 (C.A. 2), certiorari denied, 393 U.S. 1121.

2. During petitioner's cross-examination the following exchange occurred (Tr. 495–496):

> Q. When did you resign from the Internal Revenue Service?
>
> A. February 1966.
>
> Q. Wasn't that during the time you were under investigation for the alleged acceptance of a bribe?
>
> Mr. GALLOP [Petitioner's counsel]: Objection.
>
> The COURT: Sustained. Please disregard that question and do not draw any inferences from the question unfavorable to the defendant.
>
> * * * * *
>
> Q. What was the reason you resigned from the Service?
>
> A. I had a medical disability.

In rejecting the defense claim that the instruction could not cure the alleged prejudice of the question, the trial court stated (Tr. 508):

> I do not think the defendant had been prejudiced in any way by that at all. * * * The jury was promptly told to disregard it and

secondly there was no reference in the question as to a conviction or an indictment.

The court's view was correct. The question was never answered and petitioner was permitted to explain that the reason for his resignation was a medical disability. In addition, the question did not mention a formal bribery charge, and there was no testimony before the jurors to lead them to believe that petitioner had been previously tried for bribery. There was no reason in these circumstances for the jury to disregard the court's admonition.

3. Petitioner contends that the evidence was insufficient to support his conviction because it was based solely upon testimony of accomplice Pincus who had a real hope of immunity from indictment and whose testimony was of doubtful credibility.

As the court accurately stated in its charge, the conviction could be supported on the uncorroborated testimony of an accomplice alone. *Caminetti* v. *United States,* 242 U.S. 470, 495. The court further correctly instructed that the testimony of an accomplice should be received with great caution and that Pincus and Kushner were both accomplices within the meaning of the law (Tr. 551–552). Moreover, although Pincus gave the most important testimony as to the actual bribe payment, his testimony was by no means uncorroborated. On the contrary, it was supported by that of Kushner, who gave the bribe money to Pincus and was in a room only a few feet from the office when petitioner received the bribe. Other circumstantial evidence regarding the manner of petitioner's

audit (see *supra,* pp. 3–4) further supported the verdict.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
ROGER A. PAULEY,
ROBERT G. MAYSACK,
Attorneys.

APRIL 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971